Environmentalism in International Jurisprudence

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Abstract

The Whaling in the Antarctic case is a landmark judgment of the ICJ that was pronounced on the platinum jubilee of the Statute of ICJ. The judgment created history with regard to the development of international environment jurisdiction. Having the potential to transcend territorial jurisdiction of the parties, the judgment grapples with contentious issues in relation to the environment- a common concern of mankind. It is, therefore, appurtenant to the 'common heritage of mankind' w.r.t. the international law of the seas.

In the present case comment, the author analysis the several nuances of the Whaling in the Antarctic Case. The several contentions and issues raised as well as the verdict of the court have been duly studied. Moreover, the affirmative impact of the decision at hand has been noted with special regard to South-East Asia. Furthermore, the author endeavours to acknowledge all the criticisms directed against the said judgment and offers counter-arguments to the same.

Key Words: Whaling, Japan, Australia, New Zealand, ICJ, Environment.

I. Introduction

In the wake of celebrations for the seventy-fifth anniversary of the UN Charter of 1945 and the Statute of the International Court of Justice (hereinafter, the ICJ) under Chapter XIV of the Charter alike, which were followed by a global lockdown due to the pandemic, issues regarding sustainable environment resurface as a concern; having been, more than once, hitherto, considered as ideological grandeur for armchair diplomacy. The Charter is stoic about the environment as is the case for the Statute of the ICJ. After the Rio Summit (1992), the ICJ created a chamber for environmental matters in 1993, which was followed by a subsequent closure of the chamber in 2006 due to non-availability of cases. Indeed, in the technical sense of the term, the chamber received no case for settlement. However, there were but cases before the ICJ where concerns regarding sustainable environment were pleaded in express terms and the Court dealt with such contentious cases within the limits of its jurisdiction. For instance, in these following cases, concern for the environment was pleaded in minute details:

- Gabcikovo-Nagymaros Project (Hungary/ Slovakia) (25 September 1997)- ICJ Report.
- Pulp Mills on the River Uruguay (Argentina v. Uruguay) (20 April 2010)- ICJ Report.
- Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (31 March 2014)- ICJ Report.
- Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) (16 December 2015)- ICJ Report.

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Interestingly enough, while there was no matter submitted before the relevant Chamber created by the ICJ to adjudicate environmental matters, immediately after the closure of the Chamber in 2006, environmental matters appeared to be on its rise before the Court. Shortly after the first fifty years of its existence, the Court came across its maiden environmental matter, in the technical sense of the term, in 1997. Within the short span of the last decade, however, several cases concerning the environment have reached the Court and, at least three of them are environmental matters in the technical sense of the term. While the rest are, by and large, ridden with disputes between states vis-à-vis transborder harm and the consequent international responsibility following the internationally wrongful acts of the concerned errant states, at least one pertained to the issue of whaling in the Antarctic[2] and had the potential to transcend territorial jurisdiction of the state parties, *inter se*, thereby grappling with contentious issues that are larger than international concerns alone and flag a larger humanitarian concern vis-à-vis the global environment; something with the potential to get elevated as a common concern of mankind within the universal jurisdiction of "the area" and its resources, i.e., all mineral and marine living resources taken together. It, therefore, appeared somewhat appurtenant to the 'common heritage of mankind' in accordance with the jurisprudence of international law of the seas. The judgment, pronounced on the platinum jubilee of the Statute of ICJ, created history with its contribution to the development of global environmental jurisprudence and herein lies the difference between its earlier environmental judgments and the judgment in the Whaling in the Antarctic case.

II. Case reference

By virtue of an unprecedented judgment, hereby identified for the forthcoming case comment, the ICJ, thereby continued its ongoing march, w.r.t. the rule of international law towards a just world for the whales of the Antarctic Ocean, as a call of the wild, in reference to the century-old magnum opus authored by Jack London. The ICJ, thereby condemned the whaling activities of Japan in the Antarctic and directed it to refrain from such activities in the polar region, which seem to be contradictory to their treaty obligations under the Contention for the Regulation of Whaling, 1946 (hereinafter, the CRW), in general, and the obligations under Article VIII of the Convention in particular. The ICJ judgment mentioned above is scheduled to strengthen the International Whaling Commission (hereinafter, the IWC) regime in the times ahead. Also, the judgment conveys to other states indulging in such clandestine activities a clear caution against fishing in the troubled waters of the seas.

Perhaps the first of its kind, the case exposed the vulnerability of whales in the Antarctic- which, otherwise, resemble monsters w.r.t. their physical features- in wake of the aggression of Japanese Inc. who infiltrated the region by using factory ships. Indeed, Australia filed the case and, thereby fulfilled the hardcore procedural criterion under Article 59 of the Statute of the ICJ; a long battle was but initiated at the bottom by stakeholders of the international civil society movement, e.g., the International Fund for Animal Welfare, World-Wide Fund for Nature, Greenpeace, etc., by convincing the Australian government to take legal action against its Japanese counterpart on whaling for crude, commercial purposes under the

[2] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014 I.C.J. 226 (Mar. 2014).

(dis)guise of scientific whaling and, thereby disturbing the fragile ecological balance of the polar region of the Antarctic, adjacent to Australia. Later, New Zealand intervened in the matter as a state party with the same geopolitical reasoning as was apparent on the face of the record. At the bottom, however, covert diplomacy on the part of international civil society stakeholders prepared the New Zealand government to showcase a reflection of global public's opinion before the Court. Also, the movement negotiated with the Japanese government as well to minimized the influence of vested corporate interest on the same and, thereby prepared the state to face a legal battle, in good faith, on the question of whaling in the Antarctic to the gross detriment of the Southern Ocean Sanctuary. Thus, the ICJ's contentious case on whaling in the Antarctic offers a culmination point vis-à-vis a head-on collision between commercial activities (in the name of activities for scientific research) by Japanese Inc. and the survival of several species of whales, e.g. Fin, Humpback, etc., with a strategic bearing on the polar ecosystem.

III. Circumstance

On 1st June 2010, Australia instituted proceedings against Japan for alleged breach of international obligations concerning whaling. In its pleading, Australia contended the following point that (1) Japan has breached and is continuing to breach obligations under paragraphs 7(b) and 10(e) of the Schedule to the ICRW[3], and (2) Japan has also breached and is continuing to breach, inter alia, its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora[4] (hereinafter the CITES) and the Convention on Biological Diversity (hereafter the CBD).[5]

Australia, thereby requested the Court to adjudge and declare that Japan is in breach of its international obligations in implementing the second phase of the Japanese Whaling Research Programme under Special Permit in the Antarctic (hereinafter JARPA II) in the Southern Ocean and to lay down the following orders:

- cease implementation of JARPA II;
- revoke any authorizations, permits and licenses allowing the activities which are a subject of the present application; and
- Provide assurances and guarantees that it will not take any further action under the JARPA II or any similar programme until the same has been brought into conformity with its obligations under international law.
- With these points in its prayer, Australia initiated the case before the ICJ[6] and later, on 20 November 2012, New Zealand filed a declaration of intervention in the case

[3] Convention, International Whaling Commission, http://iwc.int/private/downloads/1r2jdhu5xtusws0ocw04wgcw/convention.pdf.

[4] E-Text, CITES, http://www.cites.org/eng/disc/E-Text.pdf.

[5] *Convention on Biological Diversity*, UNITED NATIONS, https://www.cbd.int/doc/legal/cbd-en.pdf.

[6] ICJ Press Release (unofficial), No. 2010/16 ICJ (Jun. 1st, 2010), http://www.icj-cij.org/docket/files/148/15953.pdf.

under Article 63 of the Statute of ICJ to adjoin it in the proceedings.[7] In bullet points, New Zealand contended that,

- Article VIII (of the ICRW) forms an integral part of the system of collective regulations established by the Convention.
- Parties to the Convention may engage in whaling by a Special Permit acquired only in accordance with Article VIII.
- Article VIII permits the killing of whales under Special Permit only if an objective assessment of methodology, design and characteristics of the programme demonstrates that the killing is only "for purpose of scientific research"; and
- The killing is necessary for, and proportionate to, the objectives of that research and will have no adverse effect on the conservation of stocks; and
- The Contracting Government issuing Special Permit has discharged its duty of meaningful cooperation with the Scientific Committee and the IWC.
- Whaling under Special Permit that does not meet these requirements of Article VIII, and not otherwise permitted by the ICRW, is prohibited.

Japan contested such a wider interpretation of Article VIII of the ICRW by Australia and New Zealand with the consequence that both sides hardened in the midst of it; the Court found no other option left but to determine what the law is. International public opinion facilitated the Court to accelerate the process.

IV. Issues in Question

The key legal issue in the case poses a moot question- the legality of large-scale "Special Permit" whaling under JARPA II, that whether and, if at all, how far the same is in consonance with multilateral Environmental Agreements (hereinafter, MEAs), e.g. the ICRW, read with the CITES and the CBD, among others. Besides, subtle political issues may and do play an instrumental role in the assessment of the impact of the Court on judicial policymaking. Indeed, as per the separate opinion of Judge Greenwood, the Court was not concerned with the moral, ethical or environmental issues relating to Japan's whaling programmes, in the present case, but only with whether JARPA II is compatible with Japan's international legal obligations under the Convention. [8] Elsewhere, Judge Bennouna noted that the issue of whaling carries a heavy emotional and cultural charge which, albeit nourished over the centuries by literature, mythology and religious writings, must not interfere with the task of the Court.[9] Despite claims, however, the Court suffered a setback from allegations of getting carried away by these extraneous factors.

V. Judgment in Brief

[7] ICJ Press Release (unofficial), No. 2012/34 ICJ (Nov. 21st 2012), http://www.icj-cij.org/docket/files/148/17182.pdf.

[8] *Supra* note 2, separate opinion of Judge Greenwood, ICJ-CIJ, 1, http://www.icj-cij.org/docket/files/148/18150.pdf.

[9] *Ibid*, dissenting opinion of Judge Greenwood, ICJ-CIJ, 1, http://www.icj-cij.org/docket/files/148/18144.pdf.

Summary of the ICJ judgment in the Antarctic Whaling case has been articulated by the Court in following heads:

- The Court concluded that Japan's objection to the Court's jurisdiction cannot be upheld since the whaling case was not one concerning the delimitation of maritime zone which is covered by the instrument of reservation issued by Australia and cited by Japan in favour of its contention.
- With regard to the phrase, "for purposes of scientific research," the Court considered that the two elements of the phrase, "scientific research" and "for purposes of" are cumulative. Even if whaling programmes involve scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are "for purposes" of scientific research.
- Turning to the meaning of the term, "for purposes of," the Court observes that even if the stated research objectives of a programme are the foundation of a programme's design, it need not pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of killing of whales under such a programme, nor is it for the Court to decide whether the design or its implementation offers best possible means of achieving its stated objectives.
- The Court observed that a state often seeks to accomplish more than one goal when it pursues a policy. Accordingly, the Court considered the possibility of government officials having motivations that go beyond scientific research and therefore, it did not preclude the conclusion that a programme is for purposes of scientific research within the meaning of Article VIII. At the same time, such motivations cannot justify granting of Special Permit for a programme that uses lethal sampling on a scale larger than what is reasonable in relation to achieving the programme's stated research objectives.

Thus, from the given summary of the judgment,[10] it seems prudent on the part of the Court to not entertain neither the arguments relating to scientific research advanced by Japan nor the arguments regarding extra-legal underpinnings advanced by Australia and New Zealand albeit the hardcore, legal reasoning from the respective sides. The Court thereby decided the matter only on the basis of international law and obligations involved therein; something Japan did breach in the course of its whaling in the Antarctic.

VI. Justice turned Global

The proceeding, with its clichéd of classical legalistic reasoning on the apparent face of the record, behind an otherwise neat texture of judicial process, conveys a judicious face of the Court which seems to have been smiling in silence. Perhaps the foremost of its kind, the judgment upheld the right to survival of other species over and above human interest vis-à-vis trade and commerce, albeit under the (dis)guise of science and technology. After the Sea Shepherd Conservation Society, albeit charged with rhetoric of its own, it may not be farfetched to infer that whales won the case against *homo sapiens* despite both the Court

[10] ICJ-CIJ, http://www.icj-cij.org/docket/files/148/18160.pdf.

along with its (international) law belonging to the latter.[11] Moreover, this marks a victory of humanity against human miserliness of not allowing sufficient breathing space for other species in their own natural habitat. Whale, as a stakeholder, represents all (other) species- both flora and fauna of the planet- on one side against *homo sapiens* with its wretched predatory praxis on the other. For the protection of endangered species toward the conservation of biological diversity, through international legal instruments like the CITES, the CBD, the ICRW, etc., the international community assumes the role of a trustee on behalf of all stakeholders of the Earth. The ICJ judgment, perhaps due to its strategic position, observes silence on these points of concern while delivering universal humane justice to this end. The world, still being stuck with an archaic positivist obsession with utilitarian fallibility, is yet to appreciate the underlying potential of environmentalism as the order of the age, in general, and of globalization, in particular. Import of a humane face into the hitherto corporate globalization is imperative to complete the process.

Last but not the least, from a deep ecological perspective, the judgment offers jurisprudence of its own. After all, whales belong to mammal fraternity and are, thereby hyperlinked to humanity with a closer connection than others even though others are not far from *homo sapiens* in the symbiotic sense of the term.[12] While self-interest is a point apart, in the larger interest of global governance, the international community ought to arrange for the survival of whales as a top marine predator to facilitate the fragile polar ecosystem from further jeopardy in times ahead. This is no truism but pragmatism for the survival of humankind, which is what public international law is meant for.

Thus, through its judgment, the Court may have strived to attain an optimal balance between the legalistic approach of the existing world order and an emerging approach in law which is deemed to reign the world in times ahead. Also, albeit arguably, the Court ought to strike the optimal balance between divergent, if not competing, claims between pressure groups, e.g. Transnational Inc., civil society movement, and the like across the world. While dealing with whaling in the Antarctic Ocean, the Court, thereby tamed an otherwise untamed trader-turned-tyrant pressure group and preached that the same is not to turn an environment of trade into a trade of the environment.[13] In course of the judicial process towards just world

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[11] *The whales have won: ICJ rules Japan's southern ocean whaling not for scientific research*, SEA SHEPHERD CONSERVATION SOCIETY, http://www.seashepherd.org/news-and-media/2014/03/31/the-whales-have-won-icj-rules-japans-southern-ocean-whaling-not-for-scientific-research-1569.

[12] BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY 67 (ed. Gibbs Smith, 1985).
"A nurturing non-dominating society can help in the "real work" of becoming a whole person. The "real work" can be summarized symbiotically as the realization of "self-in-self" where "self" stands for organic wholeness. This process of full unfolding of the self can also be summarized by the phrase, "No one is saved until we all are saved", where the phrase "one" includes not only me, an individual human, but all humans, whales, grizzly bears, whole rain forest ecosystems, mountains and rivers, the tiniest microbes in the soil, and so on."

[13] PETER SINGER, PRACTICAL ETHICS 118 (2d. 1993).
"The great apes- chimpanzees, gorillas, and orangutans- may be the clearest cases of non-human persons, but there are almost certainly others. Systematic observation of whales and dolphins has, for obvious reasons, lagged far behind that of apes, and it is quite possible that these large-brained mammals will turn

order, through the development of its own jurisprudence, the Court unwittingly contributed to the waves of an initiative for a radical international movement to voice concerns regarding the Global South against the tyranny of its counterpart over the global commons and their environment.

Despite strict silence on the question of morality, the judgment offers a discourse with potential underpinning on the interface between law and morality. Global justice, as the teleological end of humanity, remains a distant dream sans resort to law as one of the means to reach its end. Law, until married to morality, ought to fall short of being instrumental for the progressive development of mankind toward a just world. Law, sans morality, ought to turn into a tyranny of reasoning. Also, in the discursive sense of the term, reason is charged with politics of its own. For instance, the way WTO Dispute Settlement Body and its Appellate Authority theorize that environment differs from the way environment stands theorized by UNFCCC Meetings of Parties, etc. Reference may be made to the ICJ Chamber for Environmental Matters and the way it got defunct in the absence of any caseload while the environment continues to be threatened across the world. In such circumstance, eight years after the Chamber became defunct, the ICJ judgment revived controversy upon the (f)utility of a chamber for Environmental matters within the world court.

So far as the question of impact assessment of the judgment is concerned, it would depend upon whether and how far the ruling has had the potential to end whaling by Japan in the Antarctic and the effect of international rebuke on domestic trade vis-à-vis whale meat.[14] Indeed, Japan has ignored the international ignominy to this end as a foreign trade policy for a long time, which is inimical to the legitimacy of its policy towards the world. After the decisive legal position of the Court, its foreign policy lacks the legality and thus, is increasingly intimidating even for a megalomaniac merchant like Japan to afford the contentious international trade of whale meat.

VII. Impact Assessment on South Asia

In its judgment, the ICJ discouraged aggressive trade with modern technology that would risk the survival of certain species in particular regions on diversified counts vis-à-vis two international legal regimes: CITES of 1973 and CBD of 1992. India being a state party to

out to be rational and self-conscious. Despite an official moratorium, the whaling industry slaughters thousands of whales annually in the name of 'research' and the whaling nations are seeking to overturn the International Whaling Commission's moratorium so that they can return to full-scale commercial whaling."

[14] Julia Bedell, *On Thin Ice: Will the International Court of Justice's Ruling In Australia v. Japan: New Zealand Intervening End Japan's Lethal Whaling in the Antarctic?*, COLUM. J. ENVTL. L., 12 (2015).
"As a result of the Court's decision, Japan now faces both external and internal pressure to discontinue the JARPA program. Externally, if Japan does continue with NEWREP-A, it will face pushback from the international community.
The most promising outcome from the judgment is its potential impact within Japan. The ICJ judgment represents an international exposure of wrongdoing; one that Japanese citizens can no longer ignore. Even if continued external pressures remain insufficient in bringing Japan to fully discontinue its lethal whaling practices, such pressures could become catalysts for unleashing Japan's internal revolt against the government's longstanding whaling industry."

both of them, the ICJ judgment does carry great impact upon the strategic relations of South Asia. Precedents are, thereby set for similar cases, such as, (i) judicial policymaking in favour of conservation and environment-savvy trade conveys strong caution for the maritime industry to not exceed the threshold limit, and (ii) gross aberration of international obligations cannot continue to avert justice with impunity. Indeed, precedent lacks a binding value to the Court, as laid down in its Statute,[15] however, such a judgment of the world court ought to exert an impact on international relations in one way or another and South Asia is no exception to this end. Henceforth, endangered, marine living species of the Indian Ocean ought to experience better international safeguards against its genocidal exploitation for international trade even if the same usurps the cloak of so-called research and development, and the like. The Indian Ocean, along with others, thereby has emerged as a conservatory of marine flora and fauna, in general, and all threatened species, in particular, against illegal aggression against endangered species, either in the subcontinent or otherwise. Indeed, the judgment of the Court contributes to the progressive development of international law toward "a just world", to quote B. S. Chimni; in a similar context to that of global good governance.

VIII. In Lieu of a Conclusion

Albeit without mention, *in Whaling in the Antarctic case*, the Court has grappled with a perennial characteristic of the law as social- although political- institution to protect the rights of the weak from highhandedness of the might; thereby safeguarding the balance of power in the universe. Indeed, under the UN Charter, international peace and security is meant for the people. In this millennium, while flora and fauna, even beneath the surface of the seas (a common heritage of mankind), appears to be in peril, the Court has extended its protective jurisdiction to all creatures and, thereby toppled the oft-quoted fiction available in the USA and applicable to all sundry, civilized nations: "*it is a court of law; not a court of justice.*" It was an oft-quoted folklore to the (dis)credit of hitherto bureaucratic judicial traditions across the world.

Perhaps in its maiden effort to this end, the Court has transcended black-letter-law of international legal praxis and, thereby upheld justice along with its commitment towards humanity. Also, in response to a positivist cynicism against the judgment, w.r.t. Article 2 of the Statute of the ICJ, credit is due to judges who laid down the majority opinion since they upheld the independence of judiciary over and above trade diplomacy. Also, they appear conscious about the solemn declaration by themselves under Article 20 of the Statute, that they will exercise powers "*impartially and conscientiously*". Amidst the cacophony of otherwise positivist conventional regimes, the character of the coveted seat of justice, more often than not, gets lost in oblivion while the Statute- annexed to the UN Charter itself- constitutes no less black-letter-law than other conventional regimes since the UN Charter resembles the Constitution of the world; albeit, in a somewhat rhetoric (and not technical) sense of the term. As a final count, irrespective of the polemics, the Court has condemned the holocaust beneath the surface of the seas and extended global justice to other innocent

[15] Statute of the ICJ, Annex of the UN Charter, 1945, art. LIX.

creatures, over and above international justice for civilized nations in conflict and, thereby upheld its institutional character as a court of justice rather than a court of black-letter-law alone.